U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-S-, INC.

DATE: MAY 3, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which describes itself as a provider of networking services and solutions, seeks to employ the Beneficiary as a software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) Section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director found that the Petitioner was not a successor-in-interest to the original employer listed on the labor certification because the offered job was different from the job listed on the labor certification. The Director concluded that the petition was, therefore, not supported by a valid labor certification.

The matter is now before us on appeal. The Petitioner asserts that the offered job is the same as the job listed on the labor certification. The Petitioner concludes that there are only minor differences between the initial job offer and the current job offer, and asserts that it would be unreasonable to expect a position to remain unchanged throughout the employment-based immigration process. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A United States employer may sponsor a foreign national for lawful permanent residence, which is a three-part process. First, the U.S. employer must obtain a labor certification, which the U.S. Department of Labor (DOL) processes. *See* 20 C.F.R. § 656, *et seq*. The employer does so by filing an ETA Form 9089, Application for Permanent Employment Certification, with the DOL. The ETA Form 9089 sets forth: (A) the position's job duties, (B) the position's education, experience and other special requirements, (C) the required proffered wage, and (D) the position's work location(s). In addition, as part of the labor certification, the beneficiary attests to his or her education and experience. The date the ETA Form 9089 is filed becomes the "priority date" for the visa petition. 8 C.F.R. § 204.5(d).[1] The DOL's role in certifying the labor certification is set forth at

[1] The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to

section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL's approval of the labor certification affirms that, "there are not sufficient [U.S.] workers who are able, willing, qualified" to perform the position offered where the beneficiary will be employed, and that employment of such beneficiary will not "adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* The labor certification is valid for 180 days.

Following labor certification approval, a petitioner files Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS) within the labor certification validity period. *See* 20 C.F.R. § 656.30(b)(1); 8 C.F.R. § 204.5. USCIS then examines whether: (A) the petitioner can establish its ability to pay the proffered wage, (B) the degree and/or experience required for the position offered matches the petitioned-for classification, and (C) whether the beneficiary has the required education, training, and experience for the position offered. *See* Section 203(b)(3)(A)(ii) of the Act; 8 C.F.R. § 204.5.

If the I-140 visa petition is approved, then in the third and final step, the beneficiary would file an I-485, Application to Adjust Status or Register Permanent Residence, either concurrently with the I-140 petition based on a current priority date, or following approval of an I-140 petition and a current priority date. *See* 8 C.F.R. § 245. If the I-485 is approved, this application to adjust status will afford the beneficiary lawful permanent resident status.

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[2] The priority date of the petition is January 15, 2013.

A labor certification for a specific job offer is valid only for the particular job opportunity. *See* 20 C.F.R. § 656.30(c)(2). The issue before us is whether the Petitioner intends to employ the Beneficiary outside the terms of the ETA Form 9089. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979).

The labor certification was filed by [redacted] which was acquired by the Petitioner in 2013. The Director noted that such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

---

that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g).

[2] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

Part H.11 of the labor certification states that the offered position of software engineer has the following duties:

> Responsible for software development for Ethernet switching features in the areas of highly scalable switching software infrastructure and forwarding in a highly scalable data center fabric. Will use knowledge of ASICS based systems in design, coding, simulation, system bring up on ASIC based platforms, debugging, performance fine tuning and unit testing.

In response to the Director's May 4, 2015, request for evidence, however, the Petitioner submitted a copy of a February 21, 2014, letter describing the role the Beneficiary would play in the new company. The letter states that the Beneficiary "will participate (in a senior/lead role) on a project team of engineers involved in the development of software" and describes the Beneficiary's duties as:

- Define, design, develop, test, debug, release, enhance and maintain networking software (hubs, bridges, routers, switches, and etc.);
- Lead the project team on the build of a major software release, including building the software, coordinating with other departments and participating in scheduling (from conception to testing);
- Provide software design, documentation and implementation on products;
- Architect, design and deliver system software after specification of platform requirements;
- Demonstrate a high degree of originality and innovation in defining product and project level architecture;
- Influence the design of interfaces between products to ensure interoperability;
- Resolve design issues, define new software product features, and develop large portions of software;
- Champion new, improving design methodologies;
- Define Reliability, Availability, Serviceability (RAS) goals for products;
- Incorporate RAS in product design; and
- Participate and/or take a lead role in

The Director concluded that the job description provided by the Petitioner materially changed the job offer and denied the petition.

On February 19, 2016, we issued a notice of intent to dismiss (NOID). We noted that the Petitioner stated that the Beneficiary would function in a senior/lead role on a project team of engineers, while the original job offer made no mention of the position being for a senior role or team leader.

In order to better understand the original job offer, our NOID requested that the Petitioner provide a copy of the signed recruitment report required by 20 C.F.R. § 656.17(g)(1), together with copies of the prevailing wage determination, all online ads, print ads, and additional recruitment conducted for the

position, the job order, the posted notice of filing of the labor certification, and any communications with the DOL, including an audit notice and response. The Petitioner did not address this request and did not submit any of the requested documentation.

The Petitioner stated in response to the NOID that the core duties of the job remain the same and quoted the USCIS website for Petition Filing and Processing Procedures for Form I-140 as stating "ancillary changes such as a change in computer software used in the job are not in and of themselves disallowed." This case, however, does not involve a change in computer software. Rather, the record reveals that the current job offer involves a position at a senior level as a team leader, while the original job offer did not make such a designation.

The Petitioner notes that there is no requirement that the job offered by a successor be exactly the same as that on the labor certification, and that the relevant inquiry is whether any changes "could have affected the number or type of available U.S. workers that applied for the job opportunity." Adjudicator's Field Manual (AFM) § 22.2(b)(5)(B). While we agree, we are precluded from determining that the Petitioner's changes did not impact the labor market test because the Petitioner did not provide the evidence we requested in our NOID.

In response to our NOID, counsel for the Petitioner states that "the same number and type of available U.S. workers would have applied to the same job opportunity regardless of which set of job duties were used." The assertions of counsel do not constitute probative evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

On appeal, the Petitioner states that the difference between the original job offer and the current job offer is minimal; however, the Petitioner did not submit the supporting evidence relating to the original job offer that we specifically requested in our NOID. The Petitioner's assertions, unsubstantiated by supporting evidence, are insufficient to satisfy the Petitioner's burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The Petitioner has not established that the proposed employment will be in accordance with the terms of the labor certification. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg'l Comm'r 1966). Accordingly, the Director's decision is affirmed.

II. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C-S-, Inc.*, ID# 15950 (AAO May 3, 2016)